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No. 07-

IN THE

Supreme Court of the United States

MARIO ALFREDO SALINAS,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

In the decision below, the court of appeals recognized a split among the circuits on the following question:

Whether a defendant's silence before he has received the warnings required by *Miranda v. Arizona*, 384 U.S. 436 (1966), is protected by the Fifth Amendment's privilege against self-incrimination such that his silence cannot be used as substantive evidence of guilt.

PARTIES TO THE PROCEEDING

Petitioner is Mario Alfredo Salinas, defendant-appellant below.

Respondent is the United States of America, plaintiff-appellee below.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Mario Alfredo Salinas respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINION BELOW

The court of appeals' decision is reported at 480 F.3d 750 and is reprinted in the Appendix to the Petition ("App.") at 1a-15a.

JURISDICTION

The court of appeals issued its decision on March 5, 2007. App. 1a. A timely petition for rehearing was denied on April 9, 2007. App. 16a-17a. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Fifth Amendment of the United States Constitution provides, *inter alia*, that: "No person . . . shall be compelled in any criminal case to be a witness against himself." U.S. Const. amend. V. The full text of the Fifth Amendment is reproduced at App. 18a.

STATEMENT OF THE CASE

Petitioner was charged with a single count of being a felon in possession of two firearms in violation of 18 U.S.C. §§ 922(g) and 924(a)(2). ROA 88-89.[1] His defense at trial was that he did not know that there were two guns hidden in the borrowed vehicle he was driving when he was arrested for driving without insurance. The government began its opening argument by stating that petitioner never denied ownership of the guns. The government then continuously elicited testimony during the direct examination of its first

[1] Citations to "ROA" herein refer to the Record on Appeal filed with the lower court in this case. Citations to "Tr." refer to the trial transcript.

witness, the arresting officer, regarding petitioner's silence and used this silence as substantive evidence of guilt.

The Fifth Circuit has previously held that prosecutorial comment on a defendant's silence is impermissible even in the absence of the police informing a defendant of his right to remain silent under *Miranda v. Arizona*, 384 U.S. 436 (1966). Nevertheless, the panel in this case affirmed petitioner's conviction. Although it ignored its own precedent, the court of appeals described the deep circuit split on this issue, acknowledging that at least three other circuits have held that substantive use of post-arrest, pre-*Miranda* silence is impermissible under the Fifth Amendment (with some circuits similarly forbidding the use of pre-arrest, pre-*Miranda* silence), while three circuits have allowed such evidence. App. 12a. Review by this Court is warranted.

A. Constitutional Background

The Fifth Amendment prevents a defendant from being "compelled in any criminal case to be a witness against himself." U.S. Const. amend. V. This Court consistently has given effect to this protection by carefully circumscribing the extent to which the government may substantively use a defendant's silence.

In *Griffin v. California*, 380 U.S. 609, 615 (1965), when faced with the question whether the prosecution may point to a defendant's failure to testify at trial, the Court held that "the Fifth Amendment . . . forbids either comment by the prosecution on the accused's silence or instructions by the court that such silence is evidence of guilt." The Court subsequently broadened this principle to include pre-trial silence, observing in *Miranda* that because "it is impermissible to penalize an individual for exercising his Fifth Amendment privilege," "[t]he prosecution may not . . . use at trial the fact that he stood mute or claimed his privilege in the face of accusation." 384 U.S. at 468 n.37.

Nothing in this Court's Fifth Amendment case law suggests any distinction, for these purposes, between a defendant who invokes his right to silence after he receives his *Miranda* warnings and one who invokes before the warnings are given. Nevertheless, as discussed below, the federal courts of appeals are badly divided on the question whether a defendant's pre-*Miranda* silence may be used against him as substantive evidence of guilt, consistent with the Fifth Amendment.[2]

B. Factual And Procedural Background

1.a. While driving a GMC Yukon on the night of April 9, 2003, petitioner was pulled over by Officer Fulcher, of the Carrollton Police Department, for having a defective tail light. Tr. Vol. 2:210. Officer Fulcher asked petitioner for his driver's license and proof of insurance. Tr. Vol. 2:212. Petitioner provided his license but stated that he did not have proof of insurance because he was in the process of buying the vehicle. Tr. Vol. 2:213. Officer Fulcher then ran a warrant check, which revealed that petitioner's driver's license was valid, but nevertheless arrested petitioner for driving without insurance. Tr. Vol. 2:214-15. At no point,

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[2] It is important to distinguish the Fifth Amendment question presented by this case from the Due Process issue addressed in cases like *Doyle v. Ohio*, 426 U.S. 610 (1976). In *Doyle*, this Court held that the Due Process Clause prohibits use of a defendant's silence after *Miranda* warnings are given even for the limited purpose of impeachment, on the theory that the *Miranda* warnings carry an implicit promise that *no* use will be made of a defendant's silence. *Id.* at 619; *cf. Fletcher v. Weir*, 455 U.S. 603, 607 (1982) (holding that there is no due process violation when a state permits cross-examination as to post-arrest, pre-*Miranda* silence when a defendant chooses to take the stand). *Doyle*'s emphasis on the giving of *Miranda* warnings is relevant only under a Due Process analysis; it has no bearing at all on the question of whether the Fifth Amendment is violated by use of a defendant's silence as substantive evidence of guilt.

even after the formal arrest, did Officer Fulcher read petitioner his *Miranda* rights. Tr. Vol. 2:229.

After petitioner's arrest, Special Agent Iber of the Bureau of Alcohol, Tobacco, Firearms, and Explosives and Agent Fountain of the Drug Enforcement Agency, both employed by the Carrollton Police Department on the date of petitioner's arrest, conducted an inventory search of the vehicle. Tr. Vol. 2:238, 265. Special Agent Iber testified at trial that he found, among other things, a brown paper sack containing $3,397.00 in cash between the driver's seat and the center console and a black leather case containing a Rossi .357 Magnum revolver underneath the front passenger seat. Tr. Vol. 2:240-41. Special Agent Iber testified that the only thing he saw between the driver's seat and the console was the brown paper sack and that the Rossi under the passenger seat was not plainly visible. Tr. Vol. 2:249-50. Agent Fountain testified that he found a Ruger handgun located between the driver's seat and the center console. Tr. Vol. 2:266-67. He also testified that he could only see the Ruger, which was located six to seven inches down from the top of the center console, with his flashlight. Tr. Vol. 2:266-67. Petitioner was ultimately charged with one count of unlawful possession of a firearm by a convicted felon, in violation of 18 U.S.C. §§ 922(g)(1) and 924(a). ROA 88-89.

b. Petitioner's defense at trial was that he did not know the guns were hidden in the vehicle, which he had borrowed from his brother-in-law, Rosendo Moreno. Moreno testified that he bought the Rossi handgun found in the Yukon in March 2003 and that he bought the Ruger found in the vehicle from Carlos Hernandez at the end of March or in early April 2003. Tr. Vol. 3:95-96. Although Moreno did not have any documentation that he was the owner of either gun, Tr. Vol. 3:111-13, Hernandez testified that Moreno purchased the Ruger from him toward the end of March 2003. Tr. Vol. 3:140. At the time of petitioner's arrest,

Moreno confirmed that he owned both of the guns. Tr. Vol. 3:112-13.

Moreno stated that he purchased the Yukon on April 8, 2003 and drove it to a firing range later that day. Tr. Vol. 3:104, 113-14. He further testified that, after he finished target practice, he re-loaded the Ruger and the Rossi and stashed them in the Yukon—placing the Ruger between the driver's seat and the console and the Rossi in a black zipper bag between the passenger seat and the passenger seat console. Tr. Vol. 3:97, 116. After his trip to the firing range, Moreno took the vehicle to Big Rig Detailers, where petitioner worked, for some repairs. Tr. Vol. 3:91. Moreno stated that he had brought cash for the repairs, had taken out about $3,300.00 from his bank account, and had placed the money in a brown paper sack between the driver's seat and center console on top of the Ruger. Tr. Vol. 3:91-92, 98. While Moreno was at Big Rig Detailers, petitioner approached him and asked if he could borrow the Yukon because his car was in the shop. Tr. Vol. 3:92, 150-51. Moreno agreed. Tr. Vol. 3:92, 150-51. This conversation was witnessed by Christopher Cruz, the owner of Big Rig Detailers. Tr. Vol. 3:150. Moreno testified that when he heard that petitioner had been charged with possession of the two loaded weapons found in the vehicle, he "felt guilty. I mean, it was my fault." Tr. Vol. 3:93.

c. At trial, the government's case against petitioner relied heavily on petitioner's failure, after he was arrested and in the absence of any *Miranda* warnings, to offer any exculpatory account of the presence of weapons in the car. Specifically, the government used petitioner's silence during its opening argument and repeatedly elicited testimony about that silence during its case-in-chief. First, during opening arguments, the government stated:

> While the defendant was in custody and while the defendant was in the presence of Officer Fulcher

> back at Carrollton PD, the evidence is going to show that an officer by the name of Pace radioed to Fulcher telling Fulcher that Pace and others had found the two loaded weapons and had found the money in the brown paper bag in the vehicle.
>
> *At no time, at no time, the evidence is going to show, that the defendant denied ownership of the guns.*

Tr. Vol. 2:202 (emphasis added). Defense counsel objected to this line of argument to the extent "it gets into any kind of silence after arrest," Tr. Vol. 2:203, and the trial court sustained the objection.

Then, despite the court's previous ruling, the government questioned its first witness, Officer Fulcher, about the fact that another officer told him over the radio that two guns had been found in the vehicle. Tr. Vol. 2:218-19. When defense counsel objected, the government stated that it was offering this evidence "for the effect it had on the listener. . . . I'm going to ask the witness whether or not defendant heard that statement as well." Tr. Vol. 2:219. The court overruled this objection, instructed the jury that it could consider the testimony "for the limited purpose only of the impact it had on those people who heard the statement made," and allowed the government to proceed. Tr. Vol. 2:219-20.

The government continued its efforts to elicit testimony from Officer Fulcher regarding petitioner's silence. First, the government asked if petitioner was "close enough to have heard what Officer Pace relayed to" Officer Fulcher about the two guns found in the Yukon. Tr. Vol. 2:221. When Officer Fulcher answered that petitioner was close enough to have heard, the government next asked whether Officer Fulcher "recall[ed] how, if at all, the defendant reacted to the statement by Officer Pace." Tr. Vol. 2:221. Defense counsel's objection to this line of questioning was sustained. Undeterred, the prosecutor then asked a final

question: "Officer Fulcher, after the defendant's arrest, *at any time did he make any statements to you?*" Tr. Vol. 2:222 (emphasis added). The officer replied, "*No, sir*," Tr. Vol. 2:222 (emphasis added), before defense counsel had the opportunity to object. Defense counsel did object after Officer Fulcher answered the government's question. Tr. Vol. 2:222-23. The court sustained the objection and stated that it would consider whether to instruct the jury to disregard the testimony at a later time. Tr. Vol. 2:223 ("I'm not going to instruct at this time. I'll consider that later.").[3] Petitioner was ultimately convicted.

2. The Fifth Circuit (Garwood, Dennis, Owen) affirmed. The panel recognized that "there is a split among the other federal circuits as to whether a prosecutor's use of a defendant's post-arrest, pre-*Miranda* silence as substantive evidence of guilt violates the Fifth Amendment privilege against self-incrimination." App. 12a. The court of appeals proceeded to describe the split, observing that "[t]he Seventh, Ninth, and D.C. Circuits have all squarely held that it does," that "[t]he First and Sixth Circuits have gone further and have held that the substantive use of even pre-arrest silence can violate the privilege,"[4] and that "[t]he Fourth, Eighth, and Eleventh Circuits have, on the other hand, found the substantive use of post-arrest, pre-*Miranda* silence during the prosecutor's case-in-chief permissible." App. 12a.

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[3] Despite this assurance, the trial court did not reconsider a jury instruction regarding Officer Fulcher's testimony before submitting the matter to the jury. Regardless, a jury instruction could not have cured the prejudice caused by the officer's testimony regarding petitioner's silence. *See* Section II, *infra*.

[4] As discussed below, the Tenth Circuit has also held that prosecutorial reference to a defendant's pre-arrest silence during its case-in-chief violates the Fifth Amendment, *see United States v. Burson*, 952 F.2d 1196 (10th Cir. 1991), but that decision was not discussed by the lower court.

The panel, however, attempted to avoid deciding the constitutional question by stating that "[b]ecause this circuit's law remains unsettled and the other federal circuits have reached divergent conclusions on this issue, even assuming that the prosecutor's comments were improper, Salinas cannot satisfy the second prong of the plain error test–that the error be clear under existing law." App. 13a. In so holding, the panel did not even mention the Fifth Circuit's controlling precedent on this issue, *United States v. Impson*, 531 F.2d 274, 279 (5th Cir. 1976), which held that the government's reference to a defendant's post-arrest, pre-*Miranda* silence during its case-in-chief was impermissible and "intolerably prejudicial" and thus aligned the Fifth Circuit with those circuits that have refused to allow substantive government use at trial of a defendant's post-arrest, pre-*Miranda* silence.

REASONS FOR GRANTING THE PETITION

As expressly recognized by the Fifth Circuit below, App. 12a, the circuits are deeply divided over whether substantive use of a defendant's pre-*Miranda* silence violates the Fifth Amendment privilege against self-incrimination. In the post-arrest context, the Seventh, Ninth and D.C. Circuits have all held that it does, while the First, Sixth and Tenth Circuits have reached the same conclusion in the context of comments on pre-arrest silence. The Fourth, Eighth and Eleventh Circuits (effectively joined by the panel in this case), on the other hand, have held that substantive use of pre-*Miranda* silence is permissible. The states that have addressed the issue are also divided. This Court's review is warranted to resolve the circuit split and clarify the confusion among the lower courts regarding the contours of this Court's Fifth Amendment jurisprudence.

I. THE CIRCUITS ARE DIVIDED ON WHETHER THE GOVERNMENT MAY USE A DEFENDANT'S PRE-*MIRANDA* SILENCE AS SUBSTANTIVE EVIDENCE OF GUILT.

A. The Seventh, Ninth and D.C. Circuits Have Properly Held That The Fifth Amendment Prevents the Government From Using Post-Arrest, Pre-*Miranda* Silence As Substantive Evidence Of Guilt.

Three circuits have squarely and correctly held that substantive use of a defendant's post-arrest, pre-*Miranda* silence impermissibly burdens the defendant's Fifth Amendment privilege against self-incrimination. App. 12a.

In *United States v. Velarde-Gomez*, 269 F.3d 1023 (9th Cir. 2001), the Ninth Circuit sitting en banc reaffirmed its prior decisions holding that the admission of evidence of a defendant's post-arrest, pre-*Miranda* silence violates the privilege. *Id.* at 1029-30 (reaffirming *United States v. Whitehead*, 200 F.3d 634 (9th Cir. 2000)). In that case, the government elicited direct testimony from a customs agent regarding the defendant's non-responsiveness during an interview that took place following the agent's discovery of marijuana in the defendant's car but before he was read his *Miranda* rights. *Id.* at 1027. The Ninth Circuit reversed the conviction. Its holding was grounded in the basic principle that "the right to remain silent carries an 'implicit assurance' that silence will carry no penalty." *Id.* at 1028 (quoting *Doyle*, 426 U.S. at 618). The Ninth Circuit also reiterated its position that, in the post-arrest context, "regardless of whether the [*Miranda*] warnings are given, absent waiver, comment on the defendant's exercise of his right to silence violates the Fifth Amendment" because "the right to remain silent derives from the Constitution and not from the *Miranda* warnings themselves." *Id.* at 1029.

The D.C. Circuit had previously reached the same conclusion in *United States v. Moore*, 104 F.3d 377 (D.C. Cir. 1997), holding, based on this Court's decisions in *Griffin* and *Miranda*, that prosecutorial reliance on a defendant's silence after he was taken into custody was impermissible: "The silence of an arrested defendant, under *Griffin*, is an exercise of his Fifth Amendment rights which the Government cannot use to his prejudice." *Moore*, 104 F.3d at 387. Like the Ninth Circuit, the D.C. Circuit firmly stated that the fact that the defendant had not yet received his *Miranda* warnings was of no moment, observing that "[t]o hold . . . that the failure to give those . . . warnings permits the state to use a defendant's silence against him turns a whole realm of constitutional protection on its head." *Id.* at 386.

Similarly, the Seventh Circuit held that a defendant's Fifth Amendment rights were violated when a prosecutor "deliberately elicited" a reference to the defendant's post-arrest, pre-*Miranda* silence on direct examination of the arresting officer. *United States v. Hernandez*, 948 F.2d 316, 322, 324 (7th Cir. 1991) (reiterating prior precedent holding that "'it is a violation of the Fifth Amendment privilege against self-incrimination to allow a prosecutor to use as evidence of guilt a defendant's refusal to talk to the police'") (quoting *United States v. Ramos*, 932 F.2d 611, 616 (7th Cir. 1991)).

Until this case, precedent in the Fifth Circuit was squarely aligned with that of the other circuits holding that substantive use of a defendant's post-arrest, pre-*Miranda* silence by the government is impermissible. *See United States v. Impson*, 531 F.2d 274, 277-79 (5th Cir. 1976) (holding that prosecutorial reference to defendant's silence during the government's case "carried with it an intolerably prejudicial impact"); *see also United States v. Edwards*, 576 F.2d 1152, 1154 (5th Cir. 1978) (observing that it

"appear[ed] that the defendant's constitutional rights were violated by the prosecutor's comments on his silence at arrest" during closing argument).

B. The First, Sixth and Tenth Circuits Have Properly Held That The Fifth Amendment Prevents The Government From Using Pre-Arrest, Pre-*Miranda* Silence As Substantive Evidence Of Guilt.

The lower court correctly observed that some circuits have likewise held that the use of pre-arrest, pre-*Miranda* silence as substantive evidence of guilt violates the Fifth Amendment privilege against self-incrimination. *See* App. 12a. In fact, three circuits have squarely and correctly reached this conclusion.[5] *See Combs v. Coyle*, 205 F.3d 269, 283 (6th Cir. 2000) (holding that Fifth Amendment applies in pre-arrest setting and "that the use of a defendant's prearrest silence as substantive evidence of guilt violates the . . . privilege against self-incrimination"); *United States v. Burson*, 952 F.2d 1196, 1201 (10th Cir. 1991) (relying on *Griffin*'s "general rule . . . that once a defendant invokes his right to remain silent, it is impermissible for the prosecution to refer to any Fifth Amendment rights which defendant exercised" to hold that the government's substantive use of defendant's pre-arrest silence was plain error); *Coppola v.*

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[5] As the court of appeals noted, App. 12a, when faced with the question whether a defendant's right against self-incrimination was violated when the prosecution elicited testimony regarding the defendant's failure to protest when his suitcase was searched for counterfeit money, the Second Circuit also expressed doubt that evidence of pre-arrest silence can be used in the government's case-in-chief. *United States v. Caro*, 637 F.2d 869, 876 (2d Cir. 1981). The Second Circuit in that case "assume[d], without deciding, that even if [it held] that [the defendant] was not in custody . . . this would not necessarily carry the day for the prosecution in light of the fact that all of the cases permitting proof of silence . . . have involved impeachment or rebuttal of the defendant's testimony." *Id.*

Powell, 878 F.2d 1562, 1567-69 (1st Cir. 1989) ("We have found no cases by the United States Supreme Court holding or suggesting that a prearrest statement by a suspect during police interrogation that he is not going to confess can be used by the prosecutor in his case in chief.").

Logic dictates that these circuits also would not allow the substantive use of post-arrest, pre-*Miranda* silence. Indeed, the Seventh Circuit, which has disallowed the use of pre-arrest silence, *see United States ex rel. Savory v. Lane*, 832 F.2d 1011, 1017-18 (7th Cir. 1987), has also disallowed the use of post-arrest, pre-*Miranda* silence, as discussed above. *See Hernandez*, 948 F.2d at 322. The Tenth Circuit has also indicated that its prohibition on the use of pre-arrest silence would apply equally to post-arrest silence. *See United States v. Lauder*, 409 F.3d 1254, 1261 (10th Cir. 2005).

C. The Fourth, Fifth, Eighth And Eleventh Circuits Have Allowed The Substantive Use Of Post-Arrest, Pre-*Miranda* Silence.

In square conflict with the cases discussed above, four circuits, including the Fifth Circuit in this case, have held that the government may use a defendant's pre-*Miranda* silence as substantive evidence of guilt. App. 12a.

In *United States v. Frazier*, 408 F.3d 1102, 1109-11 (8th Cir. 2005), the Eighth Circuit held that substantive governmental use of the defendant's pre-*Miranda* silence does not violate the Fifth Amendment. It recognized the circuit split on this question but rejected the holdings of the Seventh, Ninth and D.C. Circuits, *id.* at 1110-11, reasoning that the Fifth Amendment privilege is "'irrelevant'" when an individual "'is under no official compulsion to speak'" and that the use of pre-*Miranda* silence is therefore permissible because such silence is not induced by any governmental action. *Id.* (quoting *Jenkins v. Anderson*, 447 U.S. 213, 241 (1980) (Stevens, J., concurring)).

Other circuits have also permitted governmental use of pre-*Miranda* silence. *See United States v. Rivera*, 944 F.2d 1563, 1568 & n.12 (11th Cir. 1991) (stating that "[t]he government may comment on a defendant's silence if it occurred prior to the time that he is arrested and given his *Miranda* warnings" and noting that the key question was "not when [the defendant] was arrested or technically in custody, but when she was given her *Miranda* warnings"); *United States v. Love*, 767 F.2d 1052, 1063 (4th Cir. 1985) (holding that direct testimony of agents regarding defendants' post-arrest silence was properly admitted because the silence occurred before defendants had been given the *Miranda* warnings).

Although it claimed not to decide the issue, the panel below completely ignored the Fifth Circuit's decision in *Impson*, discussed above, and affirmed petitioner's conviction despite the government's use of his pre-*Miranda* silence as substantive evidence of guilt. App. 12a-13a. In doing so, the Fifth Circuit completed the reversal of course it began with its decision in *United States v. Zanabria*, 74 F.3d 590, 593 (5th Cir. 1996) (holding that, in certain circumstances, prosecutorial reference to pre-arrest silence did not violate the Fifth Amendment), and aligned itself with the circuits allowing substantive use of such silence.

D. State Courts Are Also Divided On The Use Of Pre-*Miranda* Silence.

The states that have considered the issue are similarly split. Courts in Alaska, California, Colorado, Florida, Georgia, Idaho, Illinois, Maryland, Massachusetts, Minnesota, Missouri, Nebraska, Nevada, New Jersey, New York, Ohio, Pennsylvania, Texas, Washington and Wisconsin have forbidden substantive prosecutorial use of a defendant's pre-*Miranda* silence. Courts in Arizona, Connecticut, New Hampshire and North Carolina have reached the opposite conclusion. *Compare Dorman v. State*,

622 P.2d 448 (Alaska 1981); *People v. Sasser*, No. B148168, 2002 WL 259949 (Cal. Ct. App. Feb. 25, 2002); *People v. Quintana*, 665 P.2d 605 (Colo. 1983) (en banc); *State v. Hoggins*, 718 So. 2d 761 (Fla. 1998); *Mallory v. State*, 261 Ga. 625, 409 S.E.2d 839 (1991); *State v. Lopez*, 141 Idaho 575, 114 P.3d 133 (Idaho Ct. App. 2005); *People v. Strong*, 215 Ill. App. 3d 484, 574 N.E.2d 1271 (1991); *Kosh v. State*, 382 Md. 218, 854 A.2d 1259 (2004); *Commonwealth v. Andujar*, 57 Mass. App. Ct. 529, 784 N.E.2d 646 (2003); *State v. Rogers*, No. A04-378, 2004 WL 2939667 (Minn. Ct. App. Dec. 21, 2004); *State v. Graves*, 27 S.W.3d 806 (Mo. App. W.D. 2000); *State v. Rowland*, 243 Neb. 872, 452 N.W.2d 758 (1990); *Morris v. State*, 112 Nev. 260, 913 P.2d 1264 (1996); *State v. Muhammad*, 182 N.J. 551, 868 A.2d 302 (2005); *People v. Conyers*, 52 N.Y.2d 454, 420 N.E.2d 933 (1981); *State v. Combs*, 62 Ohio St. 3d 278, 581 N.E.2d 1071 (1991); *Commonwealth v. Turner*, 499 Pa. 579, 454 A.2d 537 (1982); *Wyborny v. State*, 209 S.W.3d 285 (Tex. Ct. App. 2006); *State v. Davis*, 686 P.2d 1143 (Wash. 1984); *State v. Lanoi*, 570 N.W.2d 911 (Wis. Ct. App. 1987) *with State v. Ramirez*, 178 Ariz. 116, 871 P.2d 237 (1994); *State v. Kuranko*, 71 Conn. App. 703, 803 A.2d 383 (2002); *State v. Hill*, 146 N.H. 568, 781 A.2d 979 (2001); *State v. Mitchell*, 317 N.C. 661, 346 S.E.2d 458 (1986).

* * *

In sum, three circuits (D.C., the Seventh and the Ninth) properly hold the Fifth Amendment is violated when the government points to a defendant's post-arrest, pre-*Miranda* silence as substantive evidence of guilt. Until its decision in this case, controlling precedent in the Fifth Circuit was aligned with these circuits. Three more circuits (the First, Sixth and Tenth) have reached the same conclusion with respect to pre-arrest, pre-*Miranda* silence. In direct and express conflict with those decisions, three other circuits (the Fourth, Eighth and Eleventh) hold that this practice is

permissible. Similar disarray marks state case law. The question presented is ripe for this Court's review.

II. THIS CASE IS A PROPER VEHICLE TO CONSIDER THE QUESTION PRESENTED.

This case is a proper vehicle to resolve the well-developed circuit split on the question presented here. Although the Fifth Circuit avoided expressly deciding this issue in this case on the ground that any error during the trial was not plain, App. 13a, that rationale is patently incorrect and thus presents no impediment to this Court's review.

According to the court of appeals, even assuming the prosecutor's comments were improper, petitioner could not establish that the error was clear under existing law because the circuit's own law "remain[ed] unsettled and the other federal circuits have reached divergent conclusions on this issue." App. 13a. The reality is precisely the opposite—the Fifth Circuit already has squarely decided that prosecutorial comment at trial on a defendant's post-arrest, pre-*Miranda* silence is impermissible. *See Impson*, 531 F.2d at 279. In *Impson*, the prosecutor elicited testimony regarding the defendant's post-arrest, pre-*Miranda* silence during his direct examination of the arresting officer. The court of appeals held that this testimony "carried with it an intolerably prejudicial impact." *Id.* In the process, it flatly rejected the same argument the government made in this case: that the mention of the defendant's silence was permissible simply because the testimony referred to events that occurred before the defendant had been read the *Miranda* warnings. *Id.* at 277-78 ("We discern no merit in the appellee's argument that silence in the absence of *Miranda* warnings raises a greater inference of guilt than silence following such warnings.").

Although the facts of this case are virtually identical to those in *Impson*, the court of appeals did not even mention that decision here. But, *Impson* is controlling precedent and makes clear both that the law on this issue in the Fifth

Circuit was settled at the time of petitioner's trial and that allowing such testimony is "intolerably prejudicial." *Id.* at 279. Because of this "intolerable prejudice," no jury instruction could have cured the unacceptable situation created by the prosecutor's use of petitioner's silence as evidence of guilt, both during his opening argument and during his repeated questioning of Officer Fulcher on this subject.[6] As the Fifth Circuit unequivocally stated in a case similar to *Impson*: "[T]he comment upon the silence of the accused is a crooked knife and one likely to turn in the prosecutor's hand. The circumstances under which it will not occasion a reversal are few and discrete." *Edwards*, 576 F.2d at 1155. There is no question but that the error in this case was plain.[7]

The Fifth Circuit's position as articulated in *Impson* is precisely aligned with that of the three circuits that have held that substantive use of post-arrest, pre-*Miranda* silence during the prosecutor's case-in-chief violates the Fifth Amendment privilege against self-incrimination. That question is squarely presented here, despite the court of appeals' effort to avoid it, and this Court should grant review

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[6] As noted earlier, in ruling on defense counsel's objection to Officer Fulcher's testimony that petitioner did not make any statements after his arrest, the trial court stated that it would consider a curative jury instruction later in the case. Tr. Vol. 2:223. However, the court never reconsidered this issue.

[7] The fact that the views of other circuits diverge on this issue does not alter this conclusion. The notion that an error cannot be plain when a circuit split on the issue exists comes into play *only* if there is no controlling precedent from this Court or the relevant court of appeals. *See, e.g.*, *United States v. Teague*, 443 F.3d 1310, 1319 (10th Cir. 2006) (holding that circuit split precluded a finding of plain error when "neither the Supreme Court nor the Tenth Circuit ha[d] ruled on the issue"); *United States v. Williams*, 53 F.3d 769, 772 (6th Cir. 1995) (when issue was one of first impression in the circuit, "circuit split preclude[d] a finding of plain error").

to resolve the circuit split and provide clarity in this important area of the law.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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July 9, 2007

APPENDIX A

UNITED STATES of America,
Plaintiff-Appellee,

v.

Mario Alfredo SALINAS,
Defendant-Appellant.

No. 05-10964.

United States Court of Appeals,
Fifth Circuit.

March 5, 2007.

Renee Harris Toliver, Fort Worth, TX, Susan B. Cowger, Chad Eugene Meacham, Dallas, TX, for Plaintiff-Appellee.

Jason Douglas Hawkins, Dallas, TX, for Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Texas.

Before GARWOOD, DENNIS and OWEN, Circuit Judges.

DENNIS, Circuit Judge:

This case is before us on appeal of defendant Mario Alfredo Salinas's conviction for unlawful possession of a firearm by a convicted felon, in violation of 18 U.S.C. §§ 922(g)(1) and 924(a)(2). For the reasons stated below, we AFFIRM Salinas's conviction.

I. Background and Proceedings Below

At approximately 11:15 p.m. on April 9, 2003, defendant Mario Alfredo Salinas was driving a black, 1999 GMC Yukon. Officer Erwin Fulcher of the Carrollton, Texas, police department stopped the vehicle because it had a defective tail light. Officer Fulcher asked Salinas for his license and proof of insurance. Salinas gave the officer his driver's license, but stated that he did not have proof of insurance because he was in the process of purchasing the vehicle. Officer Fulcher eventually arrested Salinas for failure to provide proof of insurance and transported Salinas to the Carrollton police station.

After Salinas was arrested, additional Carrollton police officers on the scene conducted an inventory search of the Yukon. During the search, officers found a brown paper bag, which contained $3,397 in cash, between the driver's seat and the center console. Beneath the bag, officers found a loaded Ruger 9mm semiautomatic pistol. Officers also found a black pouch containing a loaded Rossi .357 Magnum revolver under the front passenger seat. The Yukon's rear cargo area contained a gym bag with $168 and some vitamins inside it. At the police station, officers found $2,168 in cash in Salinas's jacket pocket.

Two days after his arrest, Salinas returned to the Carrollton police station and said that he wished to pick up his "money and other stuff." The property room officer stated that all of the seized property was evidence and could

not be released to Salinas. The officer also stated that, because Salinas was a convicted felon, the firearms could not be returned to him. Salinas responded, "I know that," and he then left.

Salinas ultimately was charged with one count of unlawful possession of a firearm by a convicted felon, in violation of 18 U.S.C. §§ 922(g)(1) and 924(a)(2). At trial, Salinas's defense was that he had borrowed the Yukon from his friend Rosendo Moreno, and that he did not know that the firearms were in the car. Moreno testified at trial that he purchased the Yukon on April 8, 2003, from a man named Henry Lopez. Moreno stated that, on April 9, 2003, he took the vehicle to Big Rig Detailers, an automotive shop at which Salinas worked, to have some hail damage repaired and to have the car painted. While he was there, Moreno stated, Salinas told Moreno that his car was in the shop, and he asked Moreno whether he could borrow the Yukon. To support Moreno's testimony, the defense offered into evidence a bill of sale showing a sale from Lopez to Moreno on April 8, 2003. The bill of sale indicated that it had been notarized by Jose Francisco May.

Moreno also testified that the cash and the two firearms found in the Yukon belonged to him. He stated that he purchased the .357 Magnum in a "street buy," and that he purchased the 9mm from a friend named Carlos Hernandez. Moreno testified that the guns were in the Yukon because he had used them at a gun range earlier on April 9, 2003, before he loaned the vehicle to Salinas, and that he kept the firearms loaded because he had previously been the victim of an attempted carjacking.

On cross-examination, Moreno admitted that he did not have a permit for either weapon, that the firearms were not registered to him, and that he did not have any

documentation to prove that he owned the firearms. The prosecution also cross-examined Moreno at some length about other aspects of his version of events, including the fact that, although he claimed that the $3,397 found in the Yukon belonged to him, he had never made any attempt to recover the money from the Carrollton police department.

The defense also presented testimony from Carlos Hernandez, who testified that he sold Moreno the 9mm in March 2003, and from Salinas's employer, Christopher Cruz, who stated that he recalled that Moreno brought a sport utility vehicle to Big Rig Detailers in April 2003, and that Salinas had borrowed the vehicle. Salinas did not testify in his own defense at the trial.

In rebuttal, the prosecution presented testimony from Henry Lopez, the registered owner of the Yukon. Lopez testified that he did not sell the Yukon to Moreno on April 8, 2003. Lopez stated that he sold the Yukon to a friend named Shane Clendening on April 1, 2002, and that he believed that the vehicle had since been resold several times, but that the title had never been transferred out of his name. Lopez also stated that, although he signed a bill of sale that purported to describe a sale to Rosendo Moreno on April 8, 2003, he actually signed the document on April 16, 2003, and he did so only because he believed that it would help to get the title transferred out of his name. Lopez testified that there was not a notary public present when he signed the bill of sale. The government also called Jose Francisco May, the notary public, who testified that he did not notarize the bill of sale between Lopez and Moreno.

On January 20, 2005, a jury convicted Salinas, and on July 11, 2005, the district court sentenced him to 57 months in prison. On appeal, Salinas makes two arguments. First, he argues that the prosecution improperly attempted to use

his post-arrest silence as substantive evidence of his guilt. Second, Salinas claims that the evidence at trial was insufficient to support his conviction.

II. The Prosecution's References to Salinas's Post-Arrest Silence

Salinas claims that the prosecution improperly made reference to his post-arrest silence at three points during its case-in-chief. First, during the prosecution's opening argument, the prosecutor stated, "At no time, at no time, the evidence is going to show, that the defendant denied ownership of the money or guns." Defense counsel immediately objected to that remark. The court sustained the objection and reminded the jury that it was to render its verdict only on the basis of the evidence presented, not on the arguments of counsel.

Second, during the government's examination of Officer Fulcher, who arrested Salinas and who was with Salinas at the Carrollton police station when the firearms were discovered in the Yukon, the prosecutor asked Officer Fulcher "how, if at all" Salinas reacted when he heard that firearms had been found in the Yukon. Defense counsel objected before the witness could answer, and the court sustained the objection.

Third, later in its direct examination of Officer Fulcher, the prosecution asked Officer Fulcher whether Salinas made any statements after his arrest. Officer Fulcher answered, "No, sir." Defense counsel again objected, and the court sustained the objection. Defense counsel also requested that the jury be instructed to disregard the statement. The trial judge stated that he would not then instruct the jury, but would consider an instruction at a later time. Defense counsel apparently never reiterated his request for an

instruction. In its charge to the jury, however, the court instructed the jury that the statements and arguments of the lawyers could not be considered as evidence and that the jury was to disregard any question to which the court had sustained an objection.

Salinas asserts that each of those statements was an improper comment on his post-arrest silence, in violation of his constitutional rights. The government maintains that the comments and questions were permissible. The government points out that Salinas did not receive the *Miranda*[1] warnings at the time of his arrest,[2] and it argues that the prosecution can permissibly refer to a defendant's pre-*Miranda* warning silence at trial.

Because Salinas did not properly preserve his claim of error regarding the prosecutor's comments on his post-arrest silence in the district court, we review this claim only for plain error. Although Salinas's counsel timely objected to each of the prosecutor's references to Salinas's post-arrest silence, the trial court sustained all of those objections, and the trial court's instructions to the jury made it clear that the jury was not to consider any of the challenged remarks.[3]

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[1] *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

[2] Officer Fulcher testified at trial that he did not read Salinas the *Miranda* warnings because he had no intention of interrogating Salinas.

[3] With respect to the comment made during the prosecutor's opening statement, the district court, at Salinas's request, instructed the jury that the lawyers' comments were not evidence. While the trial court declined to immediately instruct the jury to disregard the final improper remark--the court stated that it was "not going to instruct at this time," but would "consider that later"--the district court did later charge the jury that it was to disregard any question to which the court sustained an objection. In addition, nothing in the record indicates that Salinas again raised the issue with the district court or objected to its handling of the situation.

Salinas's counsel never took exception to the district court's handling of his objections, and, significantly, Salinas never requested that the district court declare a mistrial. Thus, Salinas effectively received all of the relief that he requested from the district court. When a defendant asks this court to reverse a conviction under these circumstances, the defendant essentially asks us "'to go against the implicit judgment of both the trial court and the defendant's trial counsel that the trial court's corrective action was adequate and appropriate.'" *United States v. Carter*, 953 F.2d 1449, 1465-66 (5th Cir. 1992) (quoting *United States v. Canales*, 744 F.2d 413, 431 (5th Cir. 1984)). In such cases, we consider the challenged comments under the plain error standard. *See id.* at 1466 (applying plain error standard where trial court sustained defendant's objections and defendant did not request mistrial; stating that "logically there is little difference between a case that comes to us where no objection has been made to the alleged impropriety and one where no further objection has been made to the trial judge's handling of an impropriety"); *see also Canales*, 744 F.2d at 431.

To establish plain error, the defendant must show that "(1) there is an error, (2) the error is clear or obvious, and (3) the error affects his substantial rights." *United States v. Coil*, 442 F.3d 912, 916 (5th Cir. 2006); Fed. R. Crim. P. 52(b) ("A plain error that affects substantial rights may be considered even though it was not brought to the court's attention."). An error is considered plain, or obvious, only if the error is clear under existing law. *United States v. Olano*, 507 U.S. 725, 734, 113 S. Ct. 1770, 123 L. Ed. 2d 508 (1993) (stating that a "court of appeals cannot correct an error pursuant to Rule 52(b) unless the error is clear under current law"). If those three conditions are satisfied, this court may grant relief if "the error seriously affects the fairness, integrity, or public reputation of judicial

proceedings." *United States v. Ibarra-Zelaya*, 465 F.3d 596, 606 (5th Cir. 2006) (citing *United States v. Mares*, 402 F.3d 511, 520 (5th Cir. 2005)); *United States v. Garcia-Flores*, 246 F.3d 451, 457 (5th Cir. 2001) ("'Plain error occurs when the error is so obvious and substantial that failure to notice and correct it would affect the fairness, integrity, or public reputation of judicial proceedings and would result in manifest injustice.'") (quoting *United States v. Mizell*, 88 F.3d 288, 297 (5th Cir. 1996)).

A prosecutor's invocation of the defendant's exercise of the right to remain silent can potentially implicate two, distinct constitutional rights-- due process, and the Fifth Amendment privilege against self-incrimination. We consider each in turn.

A. Due Process

In a series of cases, the Supreme Court has established that due process prevents the prosecution from commenting at trial on a criminal defendant's silence in response to the Miranda warnings, but that due process does not prohibit the prosecution from impeaching a defendant's trial testimony by referring to the defendant's pre-arrest, or post-arrest, but pre-Miranda, silence.

In *Doyle v. Ohio*, 426 U.S. 610, 96 S. Ct. 2240, 49 L. Ed. 2d 91 (1976), the Supreme Court held that the Due Process Clause ordinarily prohibits the use of a defendant's post-*Miranda* silence to impeach his trial testimony.[4] The

[4] Due process also generally prohibits the use of a defendant's post-*Miranda* silence as substantive evidence of guilt. *See United States v. Moreno*, 185 F.3d 465, 473 (5th Cir.1999). The general rule of *Doyle* is not absolute, however. For example, the prosecution can use a defendant's post-*Miranda* silence to rebut testimony by the defendant

enduring rationale of *Doyle* is that, because the *Miranda* warnings carry with them an implicit assurance by the government that it will not use the defendant's exercise of the right to remain silent against him, "it would be fundamentally unfair and a deprivation of due process to allow the arrested person's silence to be used to impeach an explanation subsequently offered at trial." *Doyle*, 426 U.S. at 618, 96 S. Ct. 2240.[5] Consistent with *Doyle*'s emphasis on fairness, the Supreme Court held in two later cases that it does not violate due process for the prosecution to impeach a defendant's testimony by reference to the defendant's pre-arrest, or post-arrest, but pre-*Miranda*, silence. *See Fletcher v. Weir*, 455 U.S. 603, 604-07, 102 S. Ct. 1309, 71 L. Ed. 2d 490 (1982) (post-arrest, pre-*Miranda* silence); *Jenkins v. Anderson*, 447 U.S. 231, 239-40, 100 S. Ct. 2124, 65 L. Ed. 2d 86 (1980) (pre-arrest silence). In *Jenkins*, the Court explained that "the fundamental unfairness present in *Doyle*" does not exist with respect to the use of pre-arrest silence on cross-examination because "no governmental action induce[s] [a defendant] to remain silent before arrest." 447 U.S. at 240, 100 S. Ct. 2124. The *Fletcher* court subsequently rejected the argument that the fact of arrest was sufficient to trigger *Doyle*'s fundamental fairness concern: "In the absence of the sort of affirmative assurances embodied in the *Miranda* warnings, we do not believe that it

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that he cooperated with the police at the time of his arrest. *See United States v. Rodriguez*, 260 F.3d 416, 421 (5th Cir. 2001).

[5] The *Doyle* court also noted that such silence is not necessarily probative because it is "insolubly ambiguous." *Doyle*, 426 U.S. at 617, 96 S. Ct. 2240. But subsequent decisions have made clear that the "fundamental fairness" rationale was the key feature of *Doyle*. *E.g.*, *Brecht v. Abrahamson*, 507 U.S. 619, 628, 113 S. Ct. 1710, 123 L. Ed. 2d 353 (1993) (noting that *Doyle* rests on fundamental fairness and finding that pre-*Miranda* silence "is probative"); see also *Rodriguez*, 260 F.3d at 421 n. 1 (stating that *Doyle*'s "'insolubly ambiguous' rationale has since been discarded").

violates due process of law for a State to permit cross-examination as to postarrest silence when a defendant chooses to take the stand." 455 U.S. at 607, 102 S. Ct. 1309; see also *United States v. Musquiz*, 45 F.3d 927, 930-31 (5th Cir. 1995) (permitting use of pre-*Miranda* silence to cross-examine defendant).

Although *Fletcher* clearly permits the use of a defendant's pre-*Miranda* silence to impeach the defendant's trial testimony, the Supreme Court has not specifically decided whether the prosecution violates *Doyle* by commenting on the defendant's pre-*Miranda* silence when the defendant does not testify in his own defense. Given *Fletcher*'s emphasis on the affirmative assurances of the *Miranda* warnings, however, it is clear that, irrespective of whether the defendant testifies at trial, the rationale of *Doyle* applies only to post-*Miranda* silence. *See Wainwright v. Greenfield*, 474 U.S. 284, 291 n. 6, 106 S. Ct. 634, 88 L. Ed. 2d 623 (1986) (noting that "fundamental unfairness" referred to in *Doyle* and its progeny "derives from the implicit assurances of the *Miranda* warnings"); *Combs v. Coyle*, 205 F.3d 269, 280 (6th Cir. 2000) ("[T]he *Doyle* line of cases clearly rests on the theory that *Miranda* warnings themselves carry an implicit assurance that silence will not be penalized; actual receipt of the warnings is key. Therefore, the comment on Combs's pre-*Miranda* silence did not violate due process."). Accordingly, because Salinas was not read the *Miranda* warnings after he was arrested in this case, the prosecutor's comments did not violate *Doyle*.

B. The Privilege Against Self-Incrimination

Salinas also argues that the prosecution's references to his post-arrest silence violated the Fifth Amendment

privilege against self-incrimination.[6] No published decision of this court has addressed whether the prosecution can, at trial, introduce substantive evidence that the defendant remained silent after he was arrested and taken into custody, but before he was given the *Miranda* warnings. This court has previously held that a prosecutor's reference to a non-testifying defendant's *pre-arrest* silence does not violate the privilege against self-incrimination if the defendant's silence is not induced by, or a response to, the actions of a government agent. *See United States v. Zanabria*, 74 F.3d 590, 593 (5th Cir. 1996).[7] Moreover, one unpublished decision of this court has interpreted *Zanabria* to permit the substantive use of post-arrest, pre-*Miranda* silence. *See*

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[6] Although the *Doyle* line of cases focused primarily on due process, in each of those cases, the prosecution used the defendant's silence only to impeach the defendant's trial testimony, so the privilege against self-incrimination was inapplicable. *See Jenkins*, 447 U.S. at 237-38, 100 S. Ct. 2124 (rejecting argument that use of pre-arrest silence for impeachment violated privilege against self-incrimination because "impeachment follows the defendant's own decision to cast aside his cloak of silence and advances the truth-finding function of the criminal trial"). As noted above, Salinas did not testify at trial.

[7] We do not read *Zanabria* as categorically holding that the prosecution's use of a defendant's pre-arrest silence as substantive evidence can never violate a defendant's constitutional rights. Indeed, the *Zanabria* court assumed, without deciding, that pre-arrest silence could be protected by the Fifth Amendment:

> Assuming without deciding that Zanabria's pre-arrest silence falls within the reach of "testimonial communications" protected by the fifth amendment, the record makes manifest that the silence at issue was neither induced by nor a response to any action by a government agent. The fifth amendment protects against compelled self-incrimination but does not, as Zanabria suggests, preclude the proper evidentiary use and prosecutorial comment about every communication or *lack* thereof by the defendant which may give rise to an incriminating inference. We find no error in the use of this evidence or in the prosecutor's comments thereon.

74 F.3d at 592.

United States v. Garcia-Gil, 133 Fed. Appx. 102, 108 (5th Cir. 2005) (stating that *Zanabria* "prevents *Garcia-Gil* from drawing a distinction based on whether the silence was used as impeachment evidence or as substantive evidence of guilt").[8]

In addition, there is a split among the other federal circuits as to whether a prosecutor's use of a defendant's post-arrest, pre-*Miranda* silence as substantive evidence of guilt violates the Fifth Amendment privilege against self-incrimination. The Seventh, Ninth, and D.C. Circuits have all squarely held that it does. *See United States v. Velarde-Gomez*, 269 F.3d 1023, 1028-30 (9th Cir. 2001) (en banc); *United States v. Whitehead*, 200 F.3d 634, 637-39 (9th Cir. 2000); *United States v. Moore*, 104 F.3d 377, 384-90 (D.C. Cir. 1997); *United States v. Hernandez*, 948 F.2d 316, 322-23 (7th Cir. 1991).[9] The First and Sixth Circuits have gone further and have held that the substantive use of even pre-arrest silence can violate the privilege against self-incrimination. *See Combs*, 205 F.3d at 280-83; *Coppola v. Powell*, 878 F.2d 1562, 1567-68 (1st Cir. 1989). The Fourth, Eighth, and Eleventh Circuits have, on the other hand, found the substantive use of post-arrest, pre-*Miranda* silence during the prosecution's case-in-chief permissible. *See United States v. Frazier*, 408 F.3d 1102, 1109-11 (8th Cir. 2005); *United States v. Rivera*, 944 F.2d 1563, 1567-68 (11th Cir. 1991); *United States v. Love*, 767 F.2d 1052, 1063 (4th Cir. 1985).

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[8] Although we do not today decide this constitutional issue, we expressly decline to endorse the reasoning of the non-precedential opinion in *Garcia-Gil*, which appears to have reached a broad holding on the use of post-arrest silence by simply extrapolating from *Zanabria*'s narrow holding on the use of pre-arrest silence on specific facts.

[9] The Second Circuit has assumed, without deciding, that such use of a defendant's pre-*Miranda* silence is impermissible. *See United States v. Caro*, 637 F.2d 869, 876 (2d Cir. 1981).

We need not decide this constitutional question today. Because this circuit's law remains unsettled and the other federal circuits have reached divergent conclusions on this issue, even assuming that the prosecutor's comments were improper, Salinas cannot satisfy the second prong of the plain error test — that the error be clear under existing law. *See United States v. Bennett*, 469 F.3d 46, 50 (1st Cir. 2006) ("In light of conflicting case law, any error that might have been committed by the district court was not 'obvious,' and therefore not plain error."); *United States v. Thompson*, 82 F.3d 849, 856 (9th Cir. 1996) ("Because of the circuit split, the lack of controlling authority, and the fact that there is at least some room for doubt about the outcome of this issue, we cannot brand the court's failure to exclude the evidence 'plain error.'") (internal footnote omitted). Accordingly, Salinas cannot establish plain error, and he is therefore not entitled to relief on this claim.

III. Sufficiency of the Evidence

Salinas's remaining argument is that the evidence at trial was insufficient to establish that he knowingly possessed the firearms that were found in the Yukon. Where, as in this case, the defendant moves for a judgment of acquittal at the close of the government's case, but fails to renew the motion at the close of all evidence, the court applies a stricter standard to a sufficiency of the evidence challenge. United States v. Green, 293 F.3d 886, 895 (5th Cir.2002); United States v. Ruiz, 860 F.2d 615, 617 (5th Cir.1988). In such cases, the court reviews the evidence only to determine whether there has been a manifest miscarriage of justice, which occurs only when the record is devoid of evidence of guilt. Green, 293 F.3d at 895; Ruiz, 860 F.2d at 617.

To convict Salinas, the government had to prove (1) that Salinas had a prior felony conviction; (2) that he possessed a

firearm; and (3) that the firearm traveled in or affected interstate commerce. *See United States v. Guidry*, 406 F.3d 314, 318 (5th Cir. 2005). The court correctly charged the jury that possession could be actual or constructive. Constructive possession can be established by showing (1) ownership, dominion or control over an item; or (2) dominion or control over the place where the item is found. *See United States v. De Leon*, 170 F.3d 494, 496 (5th Cir. 1999). Possession may be proved by circumstantial evidence. *Id.* Where there is joint occupancy or control, however, the government must, in addition to showing control over the place where the item was found, present evidence to support at least a plausible inference that the defendant knew of the item itself. *See id.* at 497.

Salinas argues that the record is devoid of evidence that he knew that the firearms were in the Yukon. As the government asserts, however, there was evidence in the record to support an inference that Salinas possessed the firearms and knew that they were in the Yukon. Contrary to his defense at trial, Salinas initially claimed that he was in the process of purchasing the Yukon, and one of the firearms was found within reach of the driver's seat, where Salinas was sitting. Moreover, two days after his arrest, Salinas attempted to claim property — specifically, his "money and other stuff"[10] — from the Yukon at the police station's property room. This evidence together was easily sufficient for a jury to conclude that the government satisfied its burden of proof. In addition, the prosecution introduced substantial evidence to rebut Salinas's proffered defense at trial. Accordingly, we find that there was sufficient evidence to support Salinas's conviction.

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[10] In this regard, it is significant that one of the weapons was found between the driver's seat and the center console, underneath a paper bag containing $3,397 in cash.

CONCLUSION

For the reasons stated above, we AFFIRM Salinas's conviction.

AFFIRMED.

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 05-10964

U.S. COURT OF APPEALS
FILED

APR 09 2007

CHARLES R. FULBRUGE III
CLERK

UNITED STATES OF AMERICA

Plaintiff - Appellee

v.

MARIO ALFREDO SALINAS

Defendant - Appellant

Appeal from the United States District Court for the
Northern District of Texas, Dallas

ON PETITION FOR REHEARING EN BANC

(Opinion 3/5/07, 5 Cir., _____, _____ F.3d _____)

Before GARWOOD, DENNIS AND OWEN, Circuit Judges.

PER CURIAM:

(√) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. No member of the panel nor judge in regular active service of the court having requested that the court be polled on Rehearing En Banc (FED. R. APP. P. and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

( ) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. The court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service and not disqualified not having voted in favor (FED. R. APP. P. and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

s/_____
James L. Dennis
United States Circuit Judge

REHG-6a

CLERK'S NOTE:
SEE FRAP AND LOCAL
RULES 41 FOR STAY OF THE
MANDATE.

APPENDIX C

CONSTITUTIONAL PROVISION INVOLVED

U.S. Const. amend. V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

(2)

No. 07-36

In the Supreme Court of the United States

MARIO ALFREDO SALINAS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

PAUL D. CLEMENT
Solicitor General
Counsel of Record

ALICE S. FISHER
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QUESTION PRESENTED

Whether references at trial to petitioner's silence after he was arrested but before he received warnings under *Miranda* v. *Arizona*, 384 U.S. 436 (1966), constituted reversible plain error.

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In the Supreme Court of the United States

No. 07-36

MARIO ALFREDO SALINAS, PETITIONER

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UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-15a) is reported at 480 F.3d 750.

JURISDICTION

The judgment of the court of appeals was entered on March 5, 2007. A petition for rehearing was denied on April 9, 2007 (Pet. App. 16a-17a). The petition for a writ of certiorari was filed on July 9, 2007 (Monday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Northern District of Texas, petitioner was convicted of one count of possessing a firearm as a convicted felon, in violation of 18 U.S.C. 922(g)(1). He was

sentenced to 57 months of imprisonment, to be followed by three years of supervised release. The court of appeals affirmed. Pet. App. 1a-15a.

1. On April 9, 2003, Officer Erwin Fulcher of the Carrollton, Texas, Police Department stopped a vehicle driven by petitioner because it had a defective taillight. Officer Fulcher instructed petitioner to get out of the vehicle and to hand over his driver's license and proof of insurance. Petitioner handed over his driver's license, but told Officer Fulcher that he did not have proof of insurance because he was in the process of purchasing the vehicle. While Officer Fulcher was running a license check, petitioner attempted to return to his vehicle, whereupon he was stopped by another officer who had arrived on the scene. The officers subsequently arrested petitioner for failure to provide proof of insurance. At the time of the arrest, the officers did not administer any warnings under *Miranda* v. *Arizona*, 384 U.S. 436 (1966). Pet. App. 2a.

Following petitioner's arrest, officers conducted an inventory search of the vehicle and found a 9-millimeter semiautomatic pistol between the driver's seat and the center console; a .357-caliber revolver under the front passenger seat; and more than $3500 in cash. Petitioner was subsequently released. Two days after his arrest, petitioner went to the police station and asked to retrieve his "money and other stuff." The officer at the station explained that the property was evidence and that, in any event, the guns could not be released to petitioner because he was a convicted felon. Petitioner responded, "I know that," and left. Pet. App. 2a-3a.

2. On October 5, 2004, a grand jury in the Northern District of Texas returned a superseding indictment charging petitioner with one count of possessing a fire-

arm as a convicted felon, in violation of 18 U.S.C. 922(g)(1). At trial, the government presented evidence that petitioner was the driver and only occupant of the vehicle; that at least one of the guns was found next to the driver's seat, within petitioner's reach; that petitioner told Officer Fulcher that he was in the process of buying the vehicle; that petitioner later attempted to retrieve all of the property from the vehicle; and that petitioner told the officer at the station that he knew that the guns could not be returned to him. Pet. App. 2a-3a. Rosendo Moreno, a friend of petitioner's, testified in petitioner's defense that he had loaned the vehicle to petitioner after purchasing it and bringing it into an automotive shop where petitioner worked, and that the guns and the cash belonged to him, not petitioner. *Id.* at 3a. On cross-examination, however, Moreno admitted that the guns were not registered to him; that he had no evidence of his ownership; and that he had made no effort to reclaim the cash that was purportedly his. *Id.* at 3a-4a. In addition, on rebuttal, the registered owner of the vehicle testified that he had not sold the vehicle to Moreno, as Moreno had claimed. *Id.* at 4a.

During trial, defense counsel objected on three occasions to comments or questions by the prosecution concerning petitioner's post-arrest silence. First, during opening statements, the prosecutor stated, "At no time, at no time, the evidence is going to show, that the defendant denied ownership of the money or guns." Defense counsel objected, stating, "I'll object going into that, Judge, if it gets into any kind of silence after arrest." The trial judge sustained the objection and told the jury that it was to render its verdict based only on the evidence and not on the arguments of counsel. Pet. App. 5a.

Second, on direct examination during the prosecution's case in chief, the prosecutor asked Officer Fulcher "how, if at all," petitioner had reacted when he heard that guns had been found in the vehicle. Before Officer Fulcher could answer, defense counsel objected; the judge sustained the objection. Pet. App. 5a.

Third, later in direct examination of the same witness, the prosecutor asked Officer Fulcher whether petitioner had made any statements after his arrest. Officer Fulcher answered, "No, sir." Defense counsel objected; the judge sustained the objection. Defense counsel asked the judge to instruct the jury to disregard the statement; the judge stated that he would not instruct the jury then, but would consider an instruction at a later time. Defense counsel apparently did not renew his request for an instruction. In his ultimate instructions to the jury, however, the judge told the jury that it should disregard any question to which the judge had sustained an objection, and further reminded the jury that statements of counsel should not be treated as evidence. Pet. App. 5a-6a.

The jury found petitioner guilty. Petitioner was sentenced to 57 months of imprisonment, to be followed by three years of supervised release. Pet. App. 4a.

3. The court of appeals affirmed. Pet. App. 1a-15a. On appeal, petitioner claimed, *inter alia*, that the prosecution had improperly used his post-arrest silence as substantive evidence of guilt, in violation of his Fifth Amendment privilege against self-incrimination. As a preliminary matter, the court of appeals held that petitioner's self-incrimination claim was reviewable only for plain error. *Id.* at 6a-7a. The court of appeals noted that, "[a]lthough [petitioner's counsel] timely objected to each of the prosecutor's references to [petitioner's]

post-arrest silence, the trial court sustained all of those objections, and the trial court's instructions to the jury made it clear that the jury was not to consider any of the challenged remarks." *Id.* at 6a. The court of appeals further noted that "[petitioner's] counsel never took exception to the district court's handling of his objections, and, significantly, [petitioner] never requested that the district court declare a mistrial." *Id.* at 7a. "Thus," the court of appeals reasoned, "[petitioner] effectively received all of the relief that he requested from the district court." *Ibid.* "When a defendant asks this court to reverse a conviction under these circumstances," the court of appeals concluded, "we consider the challenged comments under the plain error standard." *Ibid.*

Applying that standard, the court of appeals then held that the references at trial to petitioner's silence did not constitute plain error. Pet. App. 8a-13a. With regard to the Fifth Amendment privilege against self-incrimination, the court observed that "[n]o published decision of this court has addressed whether the prosecution can, at trial, introduce substantive evidence that the defendant remained silent after he was arrested and taken into custody, but before he was given the *Miranda* warnings." *Id.* at 11a. The court further observed that "there is a split among the other federal circuits as to whether a prosecutor's use of a defendant's post-arrest, pre-*Miranda* silence as substantive evidence of guilt violates the Fifth Amendment privilege against self-incrimination." *Id.* at 12a. The court of appeals concluded, however, that it "need not decide this constitutional question today" because, even assuming that there was error, petitioner could not establish that any error was plain. *Id.* at 13a. The court explained that "this circuit's law remains unsettled and the other fed-

eral circuits have reached divergent conclusions on this issue." *Ibid.*[1]

4. The court of appeals denied petitioner's petition for rehearing en banc without recorded dissent. Pet. App. 16a-17a.

ARGUMENT

Petitioner contends (Pet. 9-17) that the references at trial to his silence after he was arrested but before he received warnings under *Miranda* v. *Arizona*, 384 U.S. 436 (1966), violated his Fifth Amendment privilege against self-incrimination, and that the court of appeals' decision conflicts with decisions of other courts of appeals (and state courts of last resort). Although some courts of appeals have disagreed about whether the government may use a defendant's post-arrest, pre-warnings silence as substantive evidence of guilt, this case would not be an appropriate vehicle for considering that issue. The court of appeals did not decide whether the references to petitioner's silence violated his Fifth Amendment privilege, because it concluded that any error was not plain. Petitioner does not contest the court of appeals' determination that he did not properly preserve his claim of error (and that his claim was reviewable only for plain error). Petitioner also does not

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[1] The court of appeals also rejected petitioner's claim that the references at trial to his post-arrest silence violated his Fifth Amendment right to due process. Pet. App. 8a-10a. The court of appeals noted that, in *Doyle* v. *Ohio*, 426 U.S. 610 (1976), this Court held that the Due Process Clause prohibits the use of a defendant's silence in the wake of *Miranda* warnings to impeach his trial testimony. Pet. App. 10a. The court of appeals concluded, however, that, "irrespective of whether the defendant testifies at trial, the rationale of *Doyle* applies only to post-*Miranda* silence." *Ibid.* Petitioner does not renew his due process claim in the petition. See Pet. 3 n.2.

contend, nor can he show, that, even under the rulings of the courts of appeals on which he relies, the district court committed reversible plain error. Accordingly, this case does not implicate the asserted circuit conflict, and further review is not warranted.

1. a. In *Miranda* v. *Arizona*, *supra*, this Court held that, absent specified warnings, the government generally may not introduce statements taken in custodial interrogation as part of its case in chief. In *Doyle* v. *Ohio*, 426 U.S. 610 (1976), the Court considered a prosecutor's impeachment of the defendant's testimony at trial with the fact that the defendant had remained silent, and failed to provide the same story, after receiving *Miranda* warnings following his arrest. The Court held that the prosecution's use of the defendant's post-warnings silence was "fundamentally unfair and a deprivation of due process." *Id.* at 618. The due process violation arose, the Court explained, because *Miranda* warnings contain implicit assurances that a defendant's exercise of his "right to remain silent" will not carry with it a penalty. *Ibid.*

In *Jenkins* v. *Anderson*, 447 U.S. 231 (1980), the Court held that the Fifth Amendment privilege against self-incrimination and the right to due process were not violated when a prosecutor impeached a testifying defendant with his pre-custody, pre-warnings silence. *Id.* at 238-239. The Court concluded that *Doyle* was inapposite because "no governmental action induced [the defendant] to remain silent." *Id.* at 240. In *Fletcher* v. *Weir*, 455 U.S. 603 (1982) (per curiam), the Court applied the same analysis to a due process challenge involving impeachment with post-arrest, pre-warnings silence. The Court explained that, "[i]n the absence of the sort of affirmative assurances embodied in *Miranda*

warnings, we do not believe that it violates due process of law for a State to permit cross-examination as to postarrest silence when a defendant chooses to take the stand." *Id.* at 607.

b. This Court's decisions do not address the question whether, consistent with the Fifth Amendment privilege against self-incrimination, the prosecution may present evidence or argument concerning a defendant's post-arrest, pre-warnings silence as part of its case in chief. The courts of appeals to have addressed the issue have reached varying conclusions. Three circuits have held that the admission of evidence of such silence does not violate the Constitution. See *United States* v. *Frazier*, 408 F.3d 1102, 1109-1111 (8th Cir. 2005), cert. denied, 546 U.S. 1151 (2006); *United States* v. *Rivera*, 944 F.2d 1563, 1568 & n.12 (11th Cir. 1991); *United States* v. *Love*, 767 F.2d 1052, 1063 (4th Cir. 1985), cert. denied, 474 U.S. 1081 (1986). Three other circuits, however, have held that the admission of evidence of such silence, as substantive evidence of guilt, violates the Fifth Amendment privilege against self-incrimination. See *United States* v. *Velarde-Gomez*, 269 F.3d 1023, 1028-1030 (9th Cir. 2001) (en banc); *United States* v. *Moore*, 104 F.3d 377, 384-389 (D.C. Cir. 1997); *United States* v. *Hernandez*, 948 F.2d 316, 322-324 (7th Cir. 1992).[2] In two of those cases, the courts of appeals ultimately concluded that any error was harmless, see *Moore*, 104 F.3d at 389-390; *Hernandez*, 948 F.2d at 324-325; in the other,

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[2] Three other circuits have held that evidence of a defendant's *pre-arrest* silence may not be admitted as substantive evidence of guilt. See *Combs* v. *Coyle*, 205 F.3d 269, 283 (6th Cir.), cert. denied, 531 U.S. 1035 (2000); *United States* v. *Burson*, 952 F.2d 1196, 1200-1201 (10th Cir. 1991), cert. denied, 503 U.S. 997 (1992); *Coppola* v. *Powell*, 878 F.2d 1562, 1567-1568 (1st Cir.), cert. denied, 493 U.S. 969 (1989).

the court of appeals determined that the error was not harmless, because the government "used the testimony about [defendant's] silence as its principal means of meeting its burden on the critical element of knowledge" and the remaining evidence was "not so strong," *Velarde-Gomez*, 269 F.3d at 1035.[3]

2. This case would not be an appropriate vehicle for resolving the disagreement in the courts of appeals about whether the government may introduce evidence of a defendant's post-arrest, pre-warnings silence in its case in chief.

a. As a preliminary matter, the court of appeals in this case did not decide whether the references to petitioner's silence violated his Fifth Amendment privilege against self-incrimination. See Pet. App. 13a (concluding that the court "need not decide th[at] constitutional question today"). That is because it found that petitioner had failed sufficiently to preserve any challenge to those references. The court explained that the trial judge had sustained defense counsel's objections to the reference and that defense counsel "never took exception to the district court's handling of his objections." *Id.* at 7a. As a result, petitioner's claim—unlike the claims of the defendants in most of the cases he cites—is

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[3] Petitioner correctly notes (Pet. 13-14) that state courts have also not reached consistent results on the admissibility of post-arrest, pre-warnings silence. In many of the cases on which petitioner relies, however, the courts either relied on state constitutional provisions or evidentiary rules or found any federal constitutional error to be harmless. See, *e.g.*, *People* v. *Quintana*, 665 P.2d 605, 609-610 (Colo. 1983) (evidence was not relevant under state evidentiary rule); *State* v. *Graves*, 27 S.W.3d 806, 811-812 (Mo. Ct. App. 2000) (admission of evidence was harmless); *Commonwealth* v. *Turner*, 454 A.2d 537, 538-540 (Pa. 1982) (state constitution prohibits admission of evidence even for impeachment).

reviewable only for plain error. See Fed. R. Crim. P. 52(b); *United States* v. *Olano*, 507 U.S. 725, 732-733 (1993).[4]

Under the plain-error standard, petitioner would be entitled to relief only if he could show that (1) there was error; (2) the error was plain; (3) the error affected his substantial rights; and (4) the error seriously affected the fairness, integrity, or public reputation of judicial proceedings. *Johnson* v. *United States*, 520 U.S. 461, 466-467 (1997). The court of appeals concluded that, under the second prong of the plain-error standard, petitioner could not establish that any error was plain, because the court of appeals' law on the issue is unsettled and other courts of appeals had reached different conclusions—and, as a result, the court did not decide whether there was constitutional error in the first place. See Pet. App. 13a. This Court does not ordinarily consider questions not passed upon by the court below, see, *e.g.*, *Capital Cities Cable, Inc.* v. *Crisp*, 467 U.S. 691, 697 (1984); *California* v. *Taylor*, 353 U.S. 553, 557 n.2 (1957), and petitioner offers no reason for deviating from that practice here.

b. Petitioner does not contest the court of appeals' determination that his claim was reviewable only for plain error. Instead, he contends only that the court of appeals erred by concluding that, under the second prong of the plain-error standard, any error was plain,

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[4] In *Frazier*, the admission of evidence of the defendant's post-arrest silence was likewise reviewed only for plain error because the defendant failed to object to the prosecutor's line of questioning. 408 F.3d at 1111. The defendant thereafter filed a petition for a writ of certiorari raising a similar question to the question presented here (and alleging the same circuit conflict). This Court denied the petition. 546 U.S. 1151 (2006) (No. 05-7207).

reasoning that "the Fifth Circuit already has squarely decided that prosecutorial comment at trial on a defendant's post-arrest, pre-*Miranda* silence is impermissible." Pet. 15. The case petitioner cites for that proposition, however, is inapposite. In *United States* v. *Impson*, 531 F.2d 274 (1976), the Fifth Circuit held that a prosecutor had improperly elicited testimony from an officer that a defendant was silent after he was arrested (but before he received *Miranda* warnings). *Id.* at 278-279. That holding, however, appears to have rested on evidentiary, not constitutional, grounds. See *id.* at 279 (noting that the defendant's silence "lacked significant probative value and under these circumstances any reference to his silence carried with it an intolerably prejudicial impact"). *Impson*, moreover, predated this Court's decisions in *Jenkins* and *Fletcher*, and the Fifth Circuit declined to follow it in a subsequent case on the ground that it "refused to recognize the difference" between pre- and post-*Miranda* silence. *United States* v. *Musquiz*, 45 F.3d 927, 930-931 (5th Cir.), cert. denied, 516 U.S. 808 (1995).[5]

Notably, the parties fully briefed the issue of the precedential value of *Impson* before the court of appeals, see Gov't C.A. Br. 12 n.3; Pet. C.A. Reply Br. 5-7, 10-11, and that court evidently concluded that *Impson* did not decide the question presented here. To the extent that petitioner contends otherwise, this Court should defer to the court of appeals' interpretation of its

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[5] The other Fifth Circuit case on which petitioner relies (Pet. 10-11, 16), *United States* v. *Edwards*, 576 F.2d 1152 (1978), is distinguishable for similar reasons as *Impson*, and for an additional reason: *viz.*, because the prosecutor not only commented on the defendant's silence at the time of arrest, but also arguably commented on his decision not to testify at trial. See *id.* at 1155.

own precedent. Cf. *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957) (per curiam) (noting that this Court does not sit to resolve intracircuit conflicts).

c. Even if petitioner could show that the court of appeals erred by concluding that, under the second prong of the plain-error standard, any error was plain, this case would not be an appropriate vehicle for review of the underlying question whether there was error in the first place, because petitioner does not contend, and in any event cannot show, that any error either affected his substantial rights or seriously affected the fairness, integrity, or public reputation of judicial proceedings. See *Johnson*, 520 U.S. at 466-467. In this case, the government presented "overwhelming" and "essentially uncontroverted" evidence of petitioner's guilt. *United States* v. *Cotton*, 535 U.S. 625, 633 (2002); see, *e.g.*, *United States* v. *Wiley*, 29 F.3d 345, 349 (8th Cir.) (declining to reverse based on repeated references to the defendant's post-warnings silence, on the ground that "the government's evidence was overwhelming"), cert. denied, 513 U.S. 1005 (1994). Specifically, the government's evidence showed that petitioner was the driver and only occupant of the vehicle; that at least one of the guns was found next to the driver's seat, within petitioner's reach; that petitioner told one of the arresting officers that he was in the process of buying the vehicle; that petitioner later attempted to claim all of the property from the vehicle; and that petitioner told the officer at the station that he knew that the guns could not be returned to him. Pet. App. 2a-3a. The court of appeals noted in rejecting petitioner's challenge to the sufficiency of the evidence that the government's evidence "was easily sufficient for a jury to conclude that the government satisfied its burden of proof," *id.* at 14a, and, in

fact, the evidence cleared a much higher threshold as well.

In addition, petitioner cannot establish that he suffered any prejudice from the references at trial to his post-arrest, pre-warnings silence, because the trial judge took sufficient curative action to prevent the jury from considering evidence of that silence as substantive evidence of guilt. On each occasion, the trial judge sustained an objection either to a question that would have solicited a response concerning petitioner's silence, or to a statement by the prosecutor concerning that silence. See Pet. App. 5a-6a. The trial judge also instructed the jury that it should disregard any question to which the judge had sustained an objection and that statements of counsel should not be treated as evidence. See *ibid.*

Accordingly, even if the admission of evidence of a defendant's post-arrest, pre-warnings silence would ordinarily violate the defendant's Fifth Amendment privilege, no error occurred here, because jurors are presumed to follow their instructions. See *Richardson* v. *Marsh*, 481 U.S. 200, 211 (1987). At a minimum, the trial judge's curative actions suggest that any prejudice that petitioner suffered from the references to his silence was slight—and that any error was thus harmless. See, *e.g.*, *United States* v. *One Star*, 465 F.3d 828, 832-833 (8th Cir. 2006) (holding that admission of evidence of the defendant's post-warnings silence was harmless in light of, *inter alia*, "the district court's quick sua sponte cautionary response"). Even under the rule of the courts of appeals on which he relies, therefore, petitioner cannot show that the district court committed reversible plain error. Because the court of appeals did not decide whether there was error in this case, and because petitioner could not benefit from a holding that it is error to

admit evidence concerning a defendant's post-arrest, pre-warnings silence, review of that question in this case is not warranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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(3)

No. 07-36

IN THE

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MARIO ALFREDO SALINAS,
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v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

To gain a conviction in this closely-contested case, the federal government continuously referenced and elicited testimony regarding petitioner's post-arrest silence. Not once, not twice, but on four separate occasions the prosecutor commented on petitioner's decision after his arrest not to deny unlawful possession of a gun. Pet. 5-7. The reason for this pattern of improper inquiry, was, obviously, the weakness of the government's case. Testimony established that petitioner was driving his brother-in-law's car, that the gun belonged to his brother-in-law, and that the gun was hidden and out of plain sight. Pet. 4-5. On these facts, it was no easy task to persuade a jury to convict petitioner of unlawful gun "possession." The government's transparent strategy was to highlight at every turn petitioner's silence after his arrest.

Before this Court, the government does not dispute that the circuits are deeply divided on whether substantive use of a defendant's silence that is post arrest but before being informed of the right to remain silent under *Miranda v. Arizona*, 384 U.S. 436 (1966), is impermissible under the Fifth Amendment.[1] Nor could it, as three circuits have held that substantive use of post-arrest, pre-*Miranda* silence violates the Fifth Amendment, three more have held that substantive use of pre-arrest, pre-*Miranda* silence violates the Fifth Amendment, and still another three have held that substantive use of pre-*Miranda* silence is permissible.

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[1] In this case, petitioner was *never* informed of his right to remain silent under *Miranda*. Pet. 4.

The question presented is squarely raised here. The Fifth Circuit affirmed petitioner's conviction even though its own controlling precedent held that prosecutorial comment on a defendant's silence is impermissible. A court of appeals cannot insulate a constitutional question from review by this Court merely by the expedience of failing to address controlling circuit precedents. It is clear from the multitude of cases cited by both parties that the question whether substantive use may be made of a defendant's pre-*Miranda* silence repeatedly arises in both federal and state criminal trials across the country. Review is warranted.

I. THE GOVERNMENT AGREES THAT THE CIRCUITS ARE DIVIDED ON WHETHER THE GOVERNMENT MAY USE A DEFENDANT'S PRE-*MIRANDA* SILENCE AS SUBSTANTIVE EVIDENCE OF GUILT.

The government cannot and does not dispute that the federal courts of appeals (as well as the state courts) are deeply divided on whether a defendant's silence before he has received the warnings required by *Miranda*, is protected by the Fifth Amendment such that his silence cannot be used as substantive evidence of guilt. Opp. 8-9 & nn. 2, 3; *see also* Pet. 9-15. Three courts of appeals — the Seventh, Ninth, and D.C. Circuits — have correctly held that substantive use of a defendant's post-arrest, pre-*Miranda* silence impermissibly burdens the defendant's privilege against self-incrimination. *See, e.g.*, *United States v. Hernandez*, 948 F.2d 316, 322, 324 (7th Cir. 1991); *United States v. Velarde-Gomez*, 269 F.3d 1023, 1029-30 (9th Cir. 2001) (en banc); *United States v. Moore*, 104 F.3d 377, 386-87

(D.C. Cir. 1997). Three other courts of appeals — the First, Sixth, and Tenth Circuits — have likewise held that use of pre-arrest, pre-*Miranda* silence as substantive evidence of guilt violates the Fifth Amendment. *See, e.g., Coppola v. Powell*, 878 F.2d 1562, 1567-69 (1st Cir. 1989); *Combs v. Coyle*, 205 F.3d 269, 283 (6th Cir. 2000); *United States v. Burson*, 952 F.2d 1196, 1201 (10th Cir. 1991); *see also United States ex rel. Savory v. Lane*, 832 F.2d 1011, 1017-18 (7th Cir. 1987). Finally, another three courts of appeals — the Fourth, Eighth, and Eleventh Circuits — have allowed the substantive use of post-arrest, pre-*Miranda* silence. *See, e.g., United States v. Love*, 767 F.2d 1052, 1063 (4th Cir. 1985); *United States v. Frazier*, 408 F.3d 1102, 1109-11 (8th Cir. 2005); *United States v. Rivera*, 944 F.2d 1563, 1568 & n.12 (11th Cir. 1991).[2]

The government concedes there is circuit disarray. The government writes: "some courts of appeals have disagreed about whether the government may use a defendant's post-arrest, pre-warnings silence as substantive evidence of guilt." Opp. 6. Indeed, the government agrees with our description of the circuits. Opp. 8 & n.2 (three circuits "have held that the admission of evidence of such silence, as substantive evidence of guilt, violates the Fifth Amendment," "[t]hree other circuits have held that evidence of a defendant's *pre-arrest* silence may not be admitted as substantive evidence of guilt," and three have held that such evidence may be used) (emphasis in original). The

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[2] *See also* Pet. 13-14 (detailing the split between state courts on the question presented).

government properly concludes that "[t]he courts of appeals to have addressed the issue have reached varying conclusions." Opp. 8.

In short, there is no doubt that the question presented warrants this Court's review. The issue has seriously divided the courts of appeals. There is no reason to await further consideration of the issue. And, as this case demonstrates, the issue is of critical importance to the fairness of numerous criminal trials. The government does not dispute that the Court should clarify the state of the law. Instead, the government's sole rationale for avoiding review is that this case is not "an appropriate vehicle for resolving the disagreement in the courts of appeals. . . ." Opp. 9. As we show next, this last-ditch effort to avoid review is also unfounded.

II. THIS CASE IS A PROPER VEHICLE TO CONSIDER THE QUESTION PRESENTED.

1. The government's principal "vehicle" argument is of the "it would have made no difference" school. The government highlights *United States v. Velarde-Gomez*, 269 F.3d 1023 (9th Cir. 2001) (en banc), as an instance of where commenting on post-arrest silence was "not harmless." Opp. 8-9. There, the government "'used the testimony about [defendant's] silence as its principal means of meeting its burden on the critical element of knowledge'" and the remaining evidence was "'not so strong.'" Opp. 9, quoting *Velarde-Gomez*, 269 F.3d at 1035. Here, the government argues by way of contrast, the evidence against petitioner was "'overwhelming'" and "'essentially uncontroverted.'" Opp. 12, quoting *United States v.*

Cotton, 535 U.S. 625, 633 (2002) and citing *United States v. Wiley*, 29 F.3d 345, 349 (8th Cir. 1994). But the government's quotations *from different cases* do nothing to show the strength of the government's case here. So too, the government's catalog of supposedly damaging facts is fully consistent with petitioner's explanation, supported by witnesses, that he was driving his brother-in-law's car and was unaware of the gun hidden elsewhere in the car.[3] At most, the government presented evidence to support an "inference" that petitioner possessed the firearms at issue. Pet. App. 14a.

Put simply, this shaky case against petitioner bears a great deal of resemblance to the case against the defendant in *Velarde-Gomez*. As in *Velarde-Gomez*, the government needed to repeatedly comment on petitioner's silence in order to prove a key element (here, possession of a firearm) in a case built on circumstantial evidence. And, as in *Velarde-Gomez*, the constitutional error of commenting on petitioner's silence was far from harmless. *Cf. United States v. Edwards*, 576 F.3d 1152, 1155 (5th

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[3] For example, the government points to the fact that petitioner was the driver and only occupant of the vehicle and that he told an arresting officer that he was in the process of buying the car. Opp. 12. None of this is inconsistent with petitioner's defense that he was driving his brother-in-law's car, as his brother-in-law testified. Pet. 4-5. The government's statement that one gun was located next to the driver's seat also is fully consistent with petitioner's brother-in-law's testimony that he placed a gun between the driver's seat and the console before petitioner borrowed his car. *Id.* The location of the gun says nothing about whether petitioner knew that it was there. In short, the very facts that the government points to reveal the thinness of the evidence in this case.

Cir. 1978) ("The prosecutor by his comments brought the defendant's silence upon arrest and at trial to the attention of the jury, apparently intending to shore up his less-than-overwhelming evidence by leading the jury to make inferences of guilt from defendant's silence.").

In any event, as the Fifth Circuit itself has acknowledged, errors of this type are so prejudicial that they are almost always grounds for reversal. *See United States v. Impson*, 531 F.2d 274, 278-79 (5th Cir. 1976) (rejecting the government's contention that substantive comment on a defendant's pre-*Miranda* silence was harmless error because "any reference to his silence carried with it an intolerably prejudicial impact"); *see also Edwards*, 576 F.2d at 1155 (reversing conviction and "not[ing] that the comment upon silence of the accused is a crooked knife and one likely to turn in the prosecutor's hand. The circumstances under which it will not occasion a reversal are few and discrete."). Here, where the evidence was so thin, there is no doubt that the constitutional errors pose sufficient risk to have altered the outcome and that reversal is warranted.[4]

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[4] Although the trial judge gave a general instruction to disregard properly objected to questions, the government (Opp. 13) cites no case for the proposition that such a generic instruction can cure such a consistent pattern of unlawful questioning. To the contrary, the Fifth Circuit has properly recognized that limiting instructions are not sufficient to cure error in this context. *See Edwards*, 576 F.2d at 1154 (observing that government comment on a defendant's silence at arrest "may constitute plain error . . . and a judge's cautionary instruction will not suffice to cure the error") (internal citation omitted); *see also Impson*, 531 F.2d at 278 (holding that

2. The government also highlights that the Fifth Circuit's opinion purports to avoid deciding the question presented. The government claims that "the court did not decide whether there was constitutional error." Opp. 9-10. But any fair reading of the decision below establishes precisely the opposite.

Until this case, the Fifth Circuit was squarely aligned with the circuits which deemed it unconstitutional for a prosecutor to use a defendant's post-arrest, pre-*Miranda* silence as substantive evidence of his guilt. Indeed, the Fifth Circuit led the way, when it first held in *Impson* that substantive prosecutorial use of such silence is impermissible. 531 F.2d at 279. In doing so, it was consistent with its prior precedent: "The propriety of government counsel's eliciting testimony that a defendant was silent when arrested, without explaining his actions, has been condemned by this Court in a number of cases . . . ." *Id.* at 278. *Impson*'s holding was grounded in Fifth Amendment principles and the concern that a defendant whose post-arrest silence was commented on by the prosecution at trial would be penalized for exercising his Fifth Amendment rights. *Id.* at 277 ("Doubt should not be cast upon his credibility as a penalty for exercising his prerogative to make no statement to the arresting officer."). The Fifth Circuit again

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references to defendant's pre-*Miranda* silence were not harmless beyond a reasonable doubt even though "the reference to the defendant's silence was brief, isolated, and promptly objected to by the defense. . . . [and] a curative instruction was promptly given by the trial judge").

took this position in *Edwards*. There, it reiterated "the rule that a prosecutor may not comment on a defendant's silence at arrest." *Id.* at 1154 (citing, *inter alia*, *Miranda*, 384 U.S. at 468 n.37 (1966)).

The published decision below completely ignores these clear and binding precedents.[5] The Fifth Circuit did not even mention *Impson* in its decision, even though, as the government here concedes, "the parties fully briefed the issue of the precedential value of *Impson* before the court of appeals." Opp. 11. But the Fifth Circuit cannot avoid review by this Court through the expedience of silent decision-making.[6] The fact that the Fifth Circuit chose to

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[5] *United States v. Musquiz*, 45 F.3d 927 (5th Cir. 1995), which the government relies on, is inapposite. In that case, the defendant testified and was cross-examined on his post-arrest, pre-*Miranda* silence. *Id.* at 930. His silence was *not* introduced as part of the government's case-in-chief. The Fifth Circuit held that this was not error, relying not on this Court's Fifth Amendment jurisprudence but on its due process cases. Thus, *Impson* still controls cases where, as here, evidence of a defendant's pre-*Miranda* silence is part of the government's substantive case. Moreover, to the extent that *Musquiz* indicated in dicta that *Impson* was "fact bound," the facts in this case are virtually identical.

[6] The Fifth Circuit undertook the same silent decision-making on this issue in another recent case, *United States v. Pando Franco*, No. 06-51120, 2007 WL 2875969, at *5 (Oct. 4, 2007). In *Pando Franco*, "[a]t trial, during its case in chief, the Government made several reference to and elicited testimony regarding Pando's post-arrest, pre- and post-*Miranda* silence." *Id.* at *2. Nevertheless, just as in this case, the Fifth Circuit claimed not to decide whether the substantive use of pre-*Miranda* silence violates the Fifth Amendment — again outlining the circuit split but failing to even mention *Impson*. *Id.* at *5 & n.1. This practice simply cannot be condoned and creates further confusion in the law.

ignore controlling precedent in deciding this case does not mean that the court did not decide the question. Effectively, it did so when it chose not only not to follow but to ignore controlling precedent that dictated the opposite outcome.[7]

* * *

The question whether the government's use of a defendant's pre-*Miranda* silence as substantive evidence of guilt violates the Fifth Amendment is squarely presented here and warrants this Court's review. The government agrees that the circuits and state courts are deeply divided on this issue and does not dispute the need for clarification from this Court. There is no need for this Court to wait for a better vehicle. The Fifth Circuit's strained plain error ruling is no barrier to this Court's review. And, as the cases the government discusses show, the question presented repeatedly arises in a plain error context or in cases where the court ultimately decides any error is harmless. Opp. 8 & n.4. There is simply no need to wait to clarify this important question for the lower courts.

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[7] This Court's precedent on whether and when it will consider questions not expressly addressed by the lower court is not as black and white as the government implies. Rather, this Court has stated that "[a]lthough [it does] not ordinarily consider questions not specifically passed upon by the lower court, this rule is not inflexible, particularly in cases coming, as this one does, from the federal courts." *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 697 (1984) (internal citation omitted) (considering question when it had been raised below and was fully briefed and argued pursuant to this Court's order).

CONCLUSION

For the foregoing reasons and those previously stated, the petition should be granted.

Respectfully submitted,

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